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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY SANTILLI,

Defendant and Appellant.

A158178

(Contra Costa County
Super. Ct. No. 5-180-988-8)

Gregory Santilli appeals from an order of probation after a jury convicted him of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)) and found true an enhancement that he personally used a firearm (*id.*, § 12022.5, subd. (a)). Santilli challenges two of the trial court's evidentiary rulings and contends remand is necessary because the written probation order includes a six-year execution-suspended prison sentence that was not orally pronounced. We affirm Santilli's conviction and accept the People's concession that remand is necessary for resentencing.

BACKGROUND

A.

One afternoon in October 2017, Santilli fired a gun inside the home he shared with his girlfriend, Lisa T. The bullet struck a wall

about two feet from where Lisa was standing. Lisa called 911 and reported that Santilli “tried to shoot [her].” During the recorded call, Santilli repeatedly told Lisa, “Fuck you.”

When police officers arrived, they found Santilli naked outside, and lying face down in a puddle of urine. Santilli repeatedly swore at the officers as they approached and placed him in handcuffs. Officers found a nine-millimeter shell casing below the top of the staircase. A loaded nine-millimeter semiautomatic handgun, which contained bullets matching the shell casing, was found in Santilli’s upstairs bedroom.

When interviewed that day, Lisa told police she saw Santilli shoot *at* her. She also said he owed her \$5,000. She demonstrated how he held the gun by fully extending her right arm.

B.

Lisa testified that she paid the mortgage on the home she and Santilli shared, but he contributed to expenses. Lisa and Santilli had frequent discussions about finances, which sometimes turned hostile.

In the middle of the night before the assault, Lisa was in her separate, downstairs bedroom when she thought she heard an intruder in the house. She went upstairs and woke Santilli, who called 911 to report a break in. Afterwards, the two returned to Santilli’s bedroom, where they watched television and drank alcohol until Santilli fell asleep. Lisa returned to her bedroom.

The following afternoon, Lisa woke up and reviewed legal or financial documents. She went to the bottom of the stairs and called upstairs three or four times for Santilli to come down and help. Next,

she saw Santilli, who was naked, disoriented, and “wobbly,” at the top of the stairs. As he came down, Lisa heard a gunshot.

At trial, Lisa did not want to testify and could not recall many details, including in which hand Santilli held the gun. She remembered his arm being fully extended when he fired the gun. Lisa explained her current belief was that Santilli was trying to defend her from an intruder and what he did was a mistake and a misunderstanding. Lisa admitted she and Santilli “scuffled” in the past. But she denied being a victim of domestic violence.

C.

The defense argued that Santilli fired the gun accidentally or that, in the alternative, he acted in reasonable self-defense, defense of another, or defense of property.

Santilli testified that Lisa woke him in the middle of the night, saying that there was an intruder in the house. Santilli took a firearm, searched the house, but found no one. He called 911 to report the possible break in, but despite feeling terrified, he did not request a response. He and Lisa then drank a lot of alcohol, while watching television in his bedroom, where he eventually fell asleep.

When Santilli woke up, Lisa was yelling downstairs. He thought Lisa was yelling because the intruder had returned. He felt scared and grabbed the nearest gun before he left his bedroom. Santilli, who is left-handed, was holding the handgun in his left hand even though he normally uses his right hand to hold and fire a gun. He was still feeling the effects of the alcohol, had trouble walking, and felt disoriented.

When Santilli got to the landing at the top of the stairs, he stumbled and grabbed the railing with his right hand. The handgun went off, even though his finger was not on the trigger. Santilli testified that the gun went off by accident, without him knowingly or intentionally pulling the trigger, while it was accidentally pointed in Lisa's direction.

On cross-examination, Santilli conceded that he had owned the gun for over two years and knew how to use it. He also admitted that, on the day he fired the gun, he did not tell Lisa or the police it was an accident and never asked if she was okay.

A firearms expert testified that the nine-millimeter handgun Santilli discharged did not have many common safety features. Its only safety mechanism was a striker block mechanism, which decreases the possibility of an unintentional discharge if the gun is dropped. Testing of the gun's trigger pull showed it required about 5 to 6 pounds, and contact with the trigger, to fire.

Based on Santilli's blood alcohol content approximately three hours after the assault (0.26 percent), a forensic toxicologist estimated his blood alcohol content would have been about 0.30 percent when he fired the gun. At this level, he would experience impaired fine and gross motor skills, slowed cognition, exaggerated emotional states, and blurred vision.

D.

The jury convicted Santilli of assault with a semiautomatic firearm and returned a true finding on the personal firearm use enhancement. At sentencing, despite Santilli being presumptively ineligible for probation (Pen. Code, § 1203, subd. (e)(2)), the trial court

found Santilli's age and chronic health problems, as well as the fact this was his first offense, presented unusual circumstances justifying a probation sentence. The trial court placed Santilli on probation for five years, on condition that he serve 360 days in county jail and participate in treatment programs for both domestic violence (Pen. Code, § 1203.097, subds. (a)(6), (c)) and alcoholism. The written probation order states that the trial court imposed a six-year prison sentence with execution of the sentence suspended.

DISCUSSION

A.

Santilli argues the trial court abused its discretion and violated his due process rights by admitting evidence of uncharged domestic violence. We disagree.

1.

Over Santilli's Evidence Code section 352 objection,¹ the trial court admitted, pursuant to section 1109, evidence suggesting he committed uncharged domestic violence against Lisa. Specifically, the evidence showed that, in February 2015, Lisa called 911 and reported an assault. When a police officer responded to the house, both Lisa and Santilli appeared intoxicated. Lisa stated Santilli had "strangled" her, to the point that she could not breathe, during an argument. She did not want to press charges. Santilli told the officer he grabbed Lisa's arms but did not touch her neck. Lisa then recanted, claimed it was a

¹ Undesignated statutory references are to the Evidence Code.

misunderstanding, and said she did not want to press charges. The officer observed no marks or visible injuries.

In April 2017, the same officer responded to another call reporting domestic violence. Santilli stated Lisa punched him in the ear during an argument. Again, both Santilli and Lisa were intoxicated, and the officer saw no visible injuries.

When asked about the alleged strangulation at trial, Lisa initially claimed she could not remember. Then she testified that she “probably exaggerated” what had happened because she “was probably very intoxicated.” Lisa explained the April 2017 incident—when she allegedly punched Santilli in the ear—as an accident and “a misunderstanding.” Santilli denied ever hitting, pushing, or strangling Lisa.

2.

Evidence of prior criminal acts is ordinarily inadmissible to show a defendant’s criminal disposition. (§ 1101, subd. (a).) However, the Legislature has created an exception in cases involving domestic violence.

(§ 1109, subd. (a)(1).) Section 1109, subdivision (a)(1) provides, in relevant part: “[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.”

The analysis proceeds in two steps. First, the trial court must make a preliminary determination that there is sufficient evidence for the jury to find by a preponderance of the evidence that the defendant

committed a domestic violence offense. (See *People v. Jandres* (2014) 226 Cal.App.4th 340, 353 (*Jandres*) [construing § 1108]; *People v. Disa* (2016) 1 Cal.App.5th 654, 672.) “The court should exclude the proffered evidence only if the “showing of preliminary facts is too weak to support a favorable determination by the jury.” ’ ” (*Jandres, supra*, 226 Cal.App.4th at p. 353.) We review the trial court’s determination of this preliminary fact for abuse of discretion. (*Ibid.*)

Second, even if the evidence passes the first test and is admissible under section 1109, “the trial court must still determine, pursuant to section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury.” (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1233.) We also review the trial court’s section 352 determination for abuse of discretion. (See *People v. Thomas* (2012) 53 Cal.4th 771, 806.)

3.

Santilli argues there was insufficient evidence he actually committed domestic violence against Lisa in February 2015 and that the trial court abused its discretion by failing to hold a section 402 hearing before admitting that evidence. (See *Jandres, supra*, 226 Cal.App.4th at p. 353.) We disagree.

As recounted above, a police officer testified at trial that Lisa originally told him that Santilli “strangled” her to the point she could not breathe. She later recanted, and Santilli denied touching her neck. This testimony is consistent with the prosecutor’s offer of proof before trial. The trial court reasonably determined that Lisa’s initial report to

police was sufficient for the jury to find, based on a preponderance of the evidence, that Santilli committed a domestic violence offense in February 2015.

The “degree of certainty” that a prior offense was committed is also one of the factors a trial court should weigh in determining whether to admit or exclude prior domestic violence evidence under section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916-917 [involving section 1108]; *People v. Disa, supra*, 1 Cal.App.5th at pp. 671-673 [applying *Falsetta* factors to admission of evidence under section 1109].) In determining prejudice, “trial judges must consider such factors as [the evidence’s] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*People v. Falsetta, supra*, 21 Cal.4th at p. 917; accord, *People v. Disa, supra*, 1 Cal.App.5th at p. 671.) But the trial court is not obligated to explicitly weigh these factors on the record. (*People v. Doolin* (2009) 45 Cal.4th 390, 438.)

Contrary to Santilli’s argument, the record demonstrates the trial court fully understood and discharged its obligations under section 352. The trial court explained that the evidence was highly probative because it demonstrated Santilli’s propensity to commit domestic violence, which tended to refute Santilli’s accident defense. The

uncharged domestic violence also may explain Lisa’s recantations and memory lapses with respect to the charged assault. In short, the evidence’s probative value outweighed its potential for undue prejudice or delay.

The trial court did not abuse its discretion by declining to hold a section 402 hearing; there was no preliminary fact to be determined. Rather, the trial court correctly recognized that the conflict in Lisa’s statements was for the jury to resolve and went to the evidence’s weight, not its admissibility. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 917 [“degree of certainty” is only one of many factors]; *People v. Brown*, *supra*, 192 Cal.App.4th at pp. 1233 [“evidence of a prior act may be introduced as propensity evidence even if the defendant was acquitted of criminal charges based upon that act”].)

True, the potential for prejudice is increased by the fact that the February 2015 incident did not result in a conviction. (See *People v. Tran* (2011) 51 Cal.4th 1040, 1047 [jury might be inclined to punish defendant for uncharged acts].) On the other hand, for the reasons previously stated, the trial court reasonably concluded that the evidence was highly probative. The 2015 uncharged offense was not remote—it occurred within three years of the charged offense. And because no weapons were used or visible injuries suffered in 2015, the evidence of Santilli’s uncharged offense was less inflammatory than the evidence underlying the charged assault with a semiautomatic firearm. The testimony about the 2015 incident was also brief—it required only the testimony of one additional witness. The risk the jury would confuse the charged and uncharged incidents does not seem particularly high.

Santilli has shown no abuse of discretion and no violation of due process.

B.

Santilli also contends his conviction must be reversed because the trial court abused its discretion in admitting evidence of four additional handguns found in his bedroom that were not involved in the charged assault. We find no abuse of discretion. (*People v. Covarrubias* (2015) 236 Cal.App.4th 942, 947.)

1.

Over Santilli's relevance and section 352 objections, the prosecution was permitted to admit evidence of four additional loaded handguns found in Santilli's bedroom—two .45 caliber semiautomatic pistols, a .22 caliber semiautomatic pistol, and .357 caliber revolver. In admitting this evidence, the trial court agreed with the People that Santilli's possession of the four additional handguns was not unduly prejudicial and, at the same time, was highly probative of his knowledge of, and ability to safely handle, firearms.

2.

Evidence a defendant possessed weapons that were *not* used to commit a crime is inadmissible when its only relevance is to show the defendant is the type of person who has guns. (*People v. Riser* (1956) 47 Cal.2d 566, 577 (*Riser*), overruled on another point by *People v. Morse* (1964) 60 Cal. 2d 631, 648-649 & fn. 2; *People v. Jablonski* (2006) 37 Cal.4th 774, 822.) However, that does not mean such evidence is inadmissible if it is relevant for another purpose. (*Riser, supra*, 47 Cal.2d at p. 577; *People v. Abel* (2012) 53 Cal.4th 891, 928 [admitted as relevant to prosecution witness's credibility]; *People v. Gunder* (2007)

151 Cal.App.4th 412, 416 “[*Riser*] rule is inapposite to the present case, where defendant’s possession of a firearm on two instances shortly before the shootings . . . was relevant to refute his claim that the police planted the firearm found in his possession,” italics omitted].)

We agree with the People and the trial court that Santilli’s possession of four additional handguns was highly probative on an issue other than his propensity to possess weapons—Santilli’s familiarity with handguns. As the prosecutor put it at trial, “[i]f [Santilli is] going to say . . . it’s an accident and he didn’t know how to handle the firearm, I think it’s relevant that he owns [five] of them.” In a case like this, when possession of unrelated firearms has independent probative value, the extent to which the evidence also demonstrates criminal propensity is simply one factor to consider in assessing prejudice. (*People v. Gunder, supra*, 151 Cal.App.4th at p. 417.)

Here, the trial court reasonably concluded the probative value of the additional gun evidence would not be substantially outweighed by its likelihood for prejudice. The evidence is not particularly inflammatory. (See *People v. Doolin, supra*, 45 Cal.4th at p. 439 [“undue prejudice” refers to “‘evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues’”].) All five handguns were lawfully registered to Santilli and the trial court excluded evidence that the police found an additional six long guns or rifles in Santilli’s room.

Finally, the trial court further limited any potential prejudice by instructing the jury, using a modified version of CALCRIM No. 303, that it could consider the additional gun evidence for the limited purpose of showing Santilli’s familiarity with firearms and how they

operate, and that it could not consider this evidence for any other purpose, particularly to show that “the defendant is a bad person or as evidence that the defendant has a propensity for violence.” We presume the jury followed the instruction. (*People v. Harris* (2013) 57 Cal.4th 804, 842.)

On this record, we cannot say the trial court abused its discretion or violated Santilli’s constitutional right to due process. We need not address Santilli’s suggestion that the prosecutor misused the evidence in closing argument because Santilli did not object or ask for a corrective instruction. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

C.

Finally, Santilli contends remand is necessary because the written probation order includes a six-year execution-suspended prison sentence that was not orally pronounced at the sentencing hearing.

The People admit that the written probation order, signed by the trial judge court, conflicts with the transcript. The transcript shows the trial court did not orally impose a six-year prison sentence and suspend its execution. Likewise, the transcript is not clear that the trial court intended to suspend imposition of sentence. (See Pen. Code, §§ 1203, subd. (a), 1203.1, subd. (a).) Accordingly, we accept the People’s concession on this point and agree that remand, for clarification and oral pronouncement of any judgment imposed, is necessary. (See Pen. Code, § 1193, subd. (a); *People v. Howard* (1997) 16 Cal.4th 1081, 1087-1088 [imposition of execution-suspended prison sentence constitutes a judgment]; *People v. Mesa* (1975) 14 Cal.3d 466, 471-472 [judgment is rendered by oral pronouncement].)

DISPOSITION

Santilli's conviction is affirmed and the matter is remanded to the trial court for resentencing in a manner consistent with this opinion. If probation is granted, the trial court is directed to first determine whether to suspend imposition of sentence or impose a state prison sentence and suspend its execution. (Pen. Code, §§ 1203, subd. (a), 1203.1, subd. (a).)

BURNS, J.

We concur:

NEEDHAM, ACTING P.J.

REARDON, J.*

A158178

* Judge of the Superior Court of Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.